Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

THE CITY OF RICHMOND, OFFICER KERRY VINE and OFFICER MITCHELL PEIXOTO,
Petitioners,

VS.

JAMES FULLER, SR., and JAMES FULLER, JR.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Does a Fourth Amendment "seizure" occur when a peace officer has a sudden, unanticipated encounter with an unleashed dog and shoots it self-defensively?

LIST OF PARTIES

RULE 28.1

The parties to the proceedings below are the petitioners City of Richmond, Officer Kerry Vine and Officer Mitchell Peixoto and the respondents James Fuller, Sr. and James Fuller, Jr.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners City of Richmond, Officer Kerry Vine and Officer Mitchell Peixoto respectfully pray that a writ of certiorari issue to review the Order and Amended Opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on November 23, 1994.

OPINIONS BELOW

The Order and Amended Opinion of the United States Court of Appeals for the Ninth Circuit, dated November 23, 1994, is reported at 36 F.3d 65 (9th Cir. 1994), and appears in Appendix A hereto. The Memorandum and Order of the United States District Court for the Northern District of California, filed November 3, 1992, appears in Appendix B.

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was filed September 16, 1994; an Order rejecting a petition for rehearing and amended opinion were rendered on November 23, 1994. This petition for certiorari was filed within 90 days thereafter. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On September 3, 1991, at noontime, Richmond police officers were investigating a report of a car being stripped near the end of a residential cul-de-sac in Richmond, California. As they happened to pass by respondents' front yard, they suddenly encountered a large, unleashed dog, a labrador/great dane mix. The officers recount that the dog, barking and growling, charged them, requiring Officer Vine to fatally shoot the dog twice in self-defense. The respondents, owners of the pet dog "Champ", contend that the dog did nothing more than to stand up in the yard where it had been lying and that the shooting was unnecessary. Champ died later that day.

James Fuller, Jr. ("James Jr.") became hysterical and a friend had to wrestle him to the ground "out of fear of

further confrontation" with the officers. One of the officers pointed his gun at James Jr. to deter him from attacking. After a short period, the situation resolved itself without further complications.

Respondents filed a lawsuit against the City of Richmond and two[1] of its officers, alleging violations of substantive and procedural due process as well as state law tort claims. The City and its officers moved for summary judgment. In opposing the motion, the Fullers sought leave to amend their complaint to add claims under the Fourth Amendment that the shooting of their dog was a seizure of property and the display of authority towards James Jr. was a seizure of his person.

The District Court granted the motion for summary judgment, holding that neither the original nor the proposed amended complaint stated claims cognizable under the United States Constitution:

> The court finds that plaintiffs' section 1983 claims lack basis in law and plaintiffs' proposed amendment would not cure the deficiencies. (App. B at B-12)

On appeal, respondents challenged only the District Court's refusal to allow the proposed Fourth Amendment "seizure" claims; they did not contend that the dismissal of the due process claims was erroneous. The Ninth Circuit partially reversed the District Court, rulir g that although the display of force towards James Jr. did not constitute a constitutional violation, the killing of the dog was a "seizure" under the Fourth Amendment.

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[1] The Chief of Police also was originally named as a party but was voluntarily dismissed.

REASONS FOR GRANTING THE WRIT

I

THE NINTH CIRCUIT'S DECISION CONFLICTS WITH A DECISION OF THE SEVENTH CIRCUIT AND MISAPPLIES CONTROLLING PRECEDENT OF THIS COURT

In *Soldal v. Illinois*, ____ U.S. ____, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992), this Court was called upon to consider the requisites of a Fourth Amendment "seizure" of property. The Court's analysis illustrates that a transfer of possession from the citizen to the state official is central to the notion of a seizure:

> As a result of the state action in this case, the Soldals' domicile was not only seized, it literally was carried away, giving new meaning to the term "mobile home." We fail to see how being unceremoniously dispossessed of one's home in the manner alleged to have occurred here can be viewed as anything but a seizure invoking the protection of the Fourth Amendment. (*Id.*, 113 S.Ct. at 543.)

Soldal applied the definition of a seizure of property that was articulated in *United States v. Jacobsen*, 466 U.S. 109, 113 (1984):

> A "seizure" of property occurs when there is some meaningful interference with an individual's *possessory* interests in that property. (Italics added.)

Jacobsen was concerned with the conduct of agents of the Drug Enforcement Agency who went to a Federal Express office, opened a wrapped but damaged box, removed plastic bags and some white powder contained in a tube, and performed two destructive field tests which identified the powder as cocaine. The box was then rewrapped. (*Id.*, 466 U.S. at 111-12.) In subjecting the agents' conduct to Fourth

Amendment scrutiny, this Court identified the government's usurpation of physical possession as the cornerstone of the seizure analysis:

> Both the Magistrate and the District Court found that the agents *took custody* of the package from Federal Express after they arrived. Although respondents had entrusted possession of the items to Federal Express, *the decision by governmental authorities to exert dominion and control over the package for their own purposes clearly constituted a "seizure,"* though not necessarily an unreasonable one. (*Id.*, 466 U.S. 109, 120, fn. 18.) (Italics added.)

The Court further found that the destructive field tests affected possessory interests, not because a seizure occurs whenever property is destroyed, but because the DEA agents had already seized the property and their testing made it impossible to return it — the field tests consumed the very substances being tested:

> Here, the field test did affect respondents' possessory interests protected by the Amendment, *since by destroying a quantity of the powder it converted what had been only a temporary deprivation of possessory interests into a permanent one.* (*Id.*, 466 U.S. at 124-25.) (Italics added.)

Official action which impairs or even destroys the value of property does not necessarily implicate Fourth Amendment rights by giving rise to a "seizure." In *Pfeil v. Rogers*, 757 F.2d 850 (7th Cir. 1985), *cert. denied*, 475 U.S. 1107 (1986), the Seventh Circuit adjudicated Fourth Amendment (*Id.*, 757 F.2d at 863) and other constitutional claims arising from an officer's mission to find and destroy three

dogs and squarely held that no federal civil rights action was viable:

> Shooting four bullets into an animal as it attempts to flee its doghouse, leaving the other fatally wounded dog to die in the woods, and failing to properly dispose of their three carcasses certainly falls far below the standards of the expected conduct enunciated by the Wisconsin Law Enforcement Board. (citation) Although we find the officers' conduct offensive, it does not support an action under § 1983 because it did not violate a right guaranteed under the United States Constitution. (citation) (*Id.*, 757 F.2d at 866.)

A district court opinion has also assessed Fourth Amendment claims asserted when a town constable shot five dogs penned in a granary building:

> The only remaining Fourth Amendment issue is whether any seizure that took place was unreasonable. Engsberg contends, without citing authority, that the destruction of his dog was an unreasonable seizure by [Officer] Vandre; the Court cannot agree with that assertion and finds that the only arguable seizure in this case took place when Vandre removed the dogs to bury them on April 27, 1982. (*Engsberg v. Town of Milford*, 601 F.Supp. 1428 (W.D. Wisc. 1985), aff'd 785 F.2d 312.)

In holding that a peace officer's shooting of a dog is a Fourth Amendment "seizure", the Ninth Circuit would establish the magnitude of the "threat" to property, rather than the nature of the state action involved, as the analytical touchstone in determining whether a "seizure" has occurred:

> The destruction of property is "meaningful interference" constituting a seizure under the Fourth Amendment, *Jacobsen*, 466 U.S. at 124-25; *Bonds v. Cox*, 20

> F.3d 697, 701-02 (6th Cir. 1994), *because* the destruction of property by state officials poses as much of a threat, if not more, to people's right to be "secure . . . in their effects" as does the physical taking of them. (*Fuller v. Vines, supra*, 36 F.3d at 68.) (Italics added.)

Searches and seizures are not the only kinds of state action that can profoundly affect the value, utility or enjoyment of property, but only searches and seizures are addressed by the Fourth Amendment. There was no "seizure" here because there was no attempt by the officers to assert dominion and control over the respondents' property, nor was there an assertion of authority to exercise a right to possession in derogation of respondents' right of possession. To hold otherwise would convert virtually every case involving the state's impairment of property rights into a potential Fourth Amendment claim. The Ninth Circuit's decision blurs the distinction between *possessory* and other interests in property and creates conflict with the Seventh Circuit.

The only Circuit decision cited by the Ninth Circuit in support of the proposition that the destruction of property creates a Fourth Amendment "seizure" was *Bonds v. Cox*, 20 F.3d 697 (6th Cir. 1994), which held that the unnecessary destruction of property in the wake of a search creates a Fourth Amendment seizure. There, officers damaged a house and its contents in the course of conducting what was, beyond dispute, a search. However, the *Bonds* facts raised the specter of a Fourth Amendment violation by virtue of the "intolerable intensity and scope" of a search under *Terry v. Ohio*, 392 U.S. 1, 18 (1968), and the Sixth Circuit need not and could not have reached the broader constitutional question of whether the destruction of property by itself, without the assertion of superior possessory rights, creates a "seizure." (*See Liverpool, N.Y. & Phil. Steam-Ship Co. v. Comm. of Emigration*, 113 U.S. 33, 39 (1885).) The proper constitutional analysis of an out-of-control search is exem-

plified by *Tarpley v. Greene*, 684 F.2d 1, 9 (D.C. Cir. 1982) (search is unreasonable if it unnecessarily inflicts damage to property). Both *Bonds* and the Ninth Circuit's opinion misread this Court's decision in *Jacobsen* as equating the destruction of property with a Fourth Amendment seizure.

The essence of a Fourth Amendment seizure is the state's conscious exercise of dominion and control over a citizen's *possessory* interests[2] in property. A peace officer's fatal shooting of a dog during a sudden and unexpected encounter simply does not implicate such interests. Fully adequate state law remedies are available to citizens aggrieved by occurrences such as the respondents allege. A novel expansion of the definition of a Fourth Amendment seizure of property is unnecessary and unwarranted.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the amended opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

GIBBONS, LEES & CONLEY

TERRY SENNE
Counsel for Petitioners

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[2] "Possessory" interests refer to physical possession or custody. If such interests are deemed to be implicated whenever the value, utility or enjoyment of property is impaired or destroyed, public entities would be exposed to a whole new class of civil rights claims and constitutional doubt would attach to broad categories of state action, including that which gives rise to inverse condemnation claims.

APPENDIX A

[Ninth Circuit No. 93-15098, Nov. 23, 1994]
(36 F.3d 65 (9th Cir. 1994))

JAMES FULLER, SR.; JAMES FULLER, JR., et al.,
Plaintiffs-Appellants,

v.

OFFICER VINES, et al.,
Defendants-Appellees.

Order and Amended Opinion

ORDER

The opinion filed September 16, 1994, slip op. 11235, and appearing at 36 F.3d 65 (9th Cir. 1994) is amended as follows:

At slip op. 11242, immediately after the first sentence of the first full paragraph, replace the remainder of the paragraph with the following language.

> There is no contention that he was arrested or that his liberty was restrained, other than that he was not free to attack the officers. The officers contend that this action with the gun was necessary in order to keep James Jr. from attacking them. Although the Fullers argue that this was unnecessary, there is no contention that the officers indicated James Jr. was not free to leave. In order to constitute a seizure of the person, the action of the officers must be a restraint of liberty such that the person reasonably believes he is not free to leave. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). It is not sufficient to constitute a seizure when the restraint is only that the person is not free to attack the officers.

With this amendment, the panel has voted unanimously to deny appellees' petition for rehearing and to reject the

suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is **DENIED** and the suggestion for rehearing en banc is **REJECTED**.

OPINION

HUG, Circuit Judge:

James Fuller, Sr., James Fuller, Jr., and others in the Fuller family ("the Fullers") sued police officers of the City of Richmond and the City of Richmond under 42 U.S.C. § 1983 for the killing of their pet dog, and James Fuller, Jr. ("James Jr.") sued for interference with his liberty rights when a police officer pointed a loaded gun at him when he objected to the killing of their dog. The Fullers also alleged supplemental state statutory claims and common law claims.

The Fullers' initial complaint alleged only the constitutional violations of: (1) substantive due process and (2) procedural due process. Based on the Fullers' initial complaint, the defendants moved for summary judgment. In opposition, the Fullers filed a motion for leave to amend their complaint to allege a violation of the Fourth Amendment, contending first that the shooting of the dog was a seizure of the Fullers' property, and second that the action of the officers constituted a seizure of the person of James Jr. The district court granted the defendants' motion for summary judgment and, in doing so, denied the Fullers' motion to amend the complaint. The district court also dismissed the state law claims. We have jurisdiction under 28 U.S.C. § 1291, and we affirm in part, reverse in part, and remand for further proceedings.

I. *FACTS AND PROCEDURAL BACKGROUND*

We review a grant of summary judgment *de novo*. *Jones v. Union Pacific R.R.*, 968 F.2d 937, 940 (9th Cir. 1992). Although the events that gave rise to the Fullers' suit are in dispute, this case is before us on a grant of summary judgment, and therefore, we must accept the Fullers' portrayal of the facts as set forth in the sworn affidavits as true.

See McLaughlin v. Liu, 849 F.2d 1205, 1207-08 (9th Cir. 1988). Viewed in this light, the facts before the district court were as follows.

At approximately noon on September 3, 1991, police officers were investigating a matter when they passed by the Fullers' front yard. The Fullers were in the yard, along with their pet dog, "Champ." The Fullers allege that, as the officers approached, Champ merely stood up from where he had been lying. The officers, on the other hand, contend that Champ charged them, barking and growling. James Fuller, Sr. contends that he pleaded with the officers not to shoot his dog and told them that he could control him. Nonetheless, the officers shot Champ twice, and Champ died shortly thereafter.

After the shooting, James Jr. was upset and was "wrestled to the ground by his friend out of fear of further confrontation" with the officers. The Fullers allege that one of the officers then pointed his gun at James Jr.'s head, drew back the hammer, and threatened to kill him, despite the fact that James Jr. was a "considerable distance" from the officers. The officers contend that James Jr. charged at them, and that a weapon was pointed at him in order to subdue him. The confrontation ended without further incident.

The Fullers filed suit in federal district court alleging that the shooting of Champ and the threat of force against James Jr. constituted violations of their civil rights pursuant to 42 U.S.C. § 1983. The complaint alleged that the officers violated the Fullers' procedural and substantive due process rights. The complaint included claims against the City of Richmond for failure to properly train and supervise its officers. The complaint also asserted state law claims for negligent and intentional infliction of emotional distress, assault, and destruction of property.

Based on the original complaint, the defendants moved for summary judgment. The Fullers filed an opposition to the summary judgment motion, including a motion for leave to amend their complaint. The proposed amendment would have added allegations that the officers unlawfully "seized" the Fullers' property when they killed Champ and unlawfully "seized" James Jr. when an officer pointed a gun at him, both in violation of the Fourth Amendment.

The district court heard argument on the motions on October 16, 1992. On November 3, 1992, the court entered a memorandum opinion and order. In the order, the court granted the defendants' motion for summary judgment, finding as a matter of law that the Fullers could not establish that the officers' actions deprived them of any due process rights guaranteed by the Constitution. The court then dismissed the pendent state law claims. The district court also denied the motion to amend, finding that the proposed amendment would not cure the deficiencies in the complaint.

The Fullers then moved for reconsideration under Fed. R. Civ. P. 60(b) claiming that the court should address their Fourth Amendment seizure claims. The court denied the motion under Rule 60 stating that the Fullers failed to plead a cause of action under the Fourth Amendment in their original complaint.

II. *DISCUSSION*

The issues before this court are as follows. First, whether the district court erred in denying the Fullers' motion to amend their complaint. Second, whether the district court erred in determining that the proposed amended complaint failed to state a cause of action for the seizure of the dog in violation of the Fourth Amendment. Finally, whether the district court erred in determining that the actions of the officer in pointing a gun at James Jr. did not constitute a

seizure of his person in violation of the Fourth Amendment. The Fullers do not contend on appeal that the district court erred in granting summary judgment on their substantive and procedural due process claims.

We review motions for leave to amend for an abuse of discretion. *Partington v. Gedan*, 961 F.2d 852, 866, *as amended*, (9th Cir.), *cert. denied*, 113 S. Ct. 600 (1992). However, in light of our strong policy permitting amendment, the denial of leave to amend is "strictly" reviewed. *Gabrielson v. Montgomery Ward & Co.*, 785 F.2d 762, 765 (9th Cir. 1986). The district court denied the Fullers' motion for leave to amend on the ground that, even as alleged in the amended complaint, the complaint would not state a constitutional violation. It did not disallow the amendment because it was untimely or for any other procedural default. Because the court did not deny the motion for any procedural reason, we consider on appeal whether the complaint as amended states a cause of action with regard to the seizure of either the dog or the person, or both.

A. *Seizure of the Dog*

The Fourth Amendment provides in relevant part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. Amend. IV. Seizures of property are subject to Fourth Amendment scrutiny even though no search within the meaning of the Amendment has taken place. *Soldal v. Cook County*, U.S. ____, 113 S. Ct. 538, 546 (1992). A "seizure" of property occurs, within the meaning of the Fourth Amendment, when "there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

[1] The destruction of property is "meaningful interference" constituting a seizure under the Fourth Amendment,

Jacobsen, 466 U.S. at 124-25; *Bonds v. Cox*, 20 F.3d 697, 701-02 (6th Cir. 1994), because the destruction of property by state officials poses as much of a threat, if not more, to people's right to be "secure . . . in their effects" as does the physical taking of them. *See Tarpley v. Greene*, 684 F.2d 1, 9 (D.C. Cir. 1982). The Fullers' amended complaint alleged that the officers' killing of their dog constituted a Fourth Amendment seizure. A dog is an "effect" or "property" which can be seized. *See Lesher v. Reed*, 12 F.3d 148, 150 (8th Cir. 1994). The killing of the dog is a destruction recognized as a seizure under the Fourth Amendment, and thus, the district court abused its discretion when it denied the Fullers' motion to amend on the grounds that the shooting of the dog was not a cognizable claim under the Fourth Amendment.

[2] We conclude that the Fullers have adequately alleged a cause of action under the Fourth Amendment for the killing of their dog in the proposed amended complaint, and therefore, the motion to amend should have been granted. The affidavits submitted by the Fullers alleging the factual background are sufficient to foreclose a summary judgment on the issue. Therefore, we reverse the summary judgment on that ground.

B. *The "Seizure" of James Jr.*

The Fullers also contend that the district court erred when it denied them leave to amend the complaint to allege a Fourth Amendment seizure of James Jr. based on the officer's pointing a loaded gun at him. The only allegation in the amended complaint relating to James Jr. is the following:

> Defendants['] actions arbitrarily killing Champ and then pointing a gun at James Jr.'s head while threatening to send him "to the morgue" were not objectively reasonable and constituted the use of excessive force in

violation of the Fourth Amendment to the United States Constitution.

In James Jr.'s affidavit, the most that is alleged is that "Officer Peixoto pointed his gun directly at my head and said profane remarks to me." There is no contention that he was arrested or that his liberty was restrained, other than that he was not free to attack the officers. The officers contend that this action with the gun was necessary in order to keep James Jr. from attacking them. Although the Fullers argue that this was unnecessary, there is no contention that the officers indicated James Jr. was not free to leave. In order to constitute a seizure of the person, the action of the officers must be a restraint of liberty such that the person reasonably believes he is not free to leave. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). It is not sufficient to constitute a seizure when the restraint is only that the person is not free to attack the officers.

[3] Even considering the amended complaint and the factual submissions relating to James Jr., the allegations are insufficient to constitute a Fourth Amendment violation for seizure of the person. The allegations may constitute a state tort violation, but as alleged, they do not constitute a constitutional violation. We conclude that the summary judgment was properly granted as to any violation of James Jr.'s constitutional rights based on a seizure of his person in violation of the Fourth Amendment.

III. *CONCLUSION*

Summary judgment was properly granted on the claim of James Jr. that his Fourth Amendment rights were violated by a seizure of the person. However, the district court erred when it denied the Fullers leave to amend to state a cause of action for the seizure of the dog. The factual material submitted in support of that allegation creates a genuine issue of material fact precluding summary judgment. Thus,

we reverse the summary judgment as to the seizure of the dog. The state law claims were dismissed because of the summary judgment on the federal claims and are therefore reinstated. We remand the case for further proceedings in accordance with this opinion and reconsideration of the dismissal of the state law claims. The Fullers' request for attorneys' fees
is premature as there is not, as yet, any prevailing party in this litigation.

AFFIRMED in part, REVERSED in part, and REMANDED.

Appendix B

[U.S. District Court No. C-92-2412 MHP, Nov. 3, 1992]

JAMES FULLER, et al.,
Plaintiffs,

v.

OFFICER VINES, et al.,
Defendants.

Memorandum and Order

MARILYN HALL PATEL, United States District Judge

On June 24, 1992, plaintiffs, James Fuller ("Fuller"), James Fuller, Jr. ("Lenny"), Melissa Fuller, Dorothy Fuller, Crystal Fuller, and Felicia Fuller, commenced this action against Officers Vines and Peixoto, Chief Clements and the City of Richmond under 42 U.S.C. § 1983 for the killing of their pet dog, Champ, and for the alleged assault against Lenny. Plaintiffs also alleged supplemental state statutory and common law tort claims. Plaintiffs brought their actions against defendants in their individual and official capacities.

On September 9, 1992, defendants moved for summary judgment on the grounds that none of the alleged actions rose to the level of a section 1983 violation. Defendants also moved to dismiss the supplemental state law claims.

Having considered the submissions and arguments of the parties, and for the following reasons, the court GRANTS defendants' motion for summary judgment. The court also DISMISSES the supplemental state law claims. Finally, the court DENIES plaintiffs' motion for continuance under Federal Rule of Civil Procedure 56(f) and DENIES plaintiffs' motion to amend under Rule 15(a).

BACKGROUND

On September 3, 1991, at approximately 12:00 noon, Richmond police officers Vines and Peixoto were investigating a matter when they passed in front of plaintiffs' yard. Fuller, Lenny and plaintiffs' dog "Champ," a labrador/great dane mix, were in the yard. The events that followed are disputed. Plaintiffs allege that the dog "stood up from the spot where he was laying" upon seeing the officers. Defendants claim that the dog "charged at the officers". It is also disputed whether the dog barked and growled at the officers.

Plaintiff Fuller alleges that prior to the shooting of his dog, he had stated to the officers "don't shoot my dog — I can control my dog." Officer Vines contends that he was fearful for his safety and therefore shot at the dog. Officer Vines also contends that he shot Champ the second time because the dog continued to growl at him. The dog died within the hour.

Plaintiffs allege that after the shooting of the dog, Lenny "was upset by the cold-blooded cruelty of the officers and [he] was wrestled to the ground by his friend out of fear of further confrontation with the police officers." Plaintiffs allege that Officer Peixoto raised his gun, pointed it directly at Lenny's head, pulled back the hammer and blurted profane remarks. Defendants contend that Lenny had become hysterical, charged at the officers despite their commands to stop, until a relative tackled him in the front yard. Defendants admit that they had pointed their weapons at Lenny, while ordering him to stop. Plaintiffs do not dispute that the officers did not arrest any of the plaintiffs, or use physical force personally against them. Also, no search or seizure took place.

LEGAL STANDARD

Under Federal Rule of Civil Procedure 56, summary judgment is proper "if the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). *See also T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (the nonmoving party may not rely on the pleadings but must present specific facts creating a genuine issue of material fact); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (a dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.")

The court's function, however, is not to make credibility determinations. *Id.* at 249. The inferences to be drawn from the facts must be viewed in a light most favorable to the party opposing the motion. *T.W. Elec. Serv.*, 809 F.2d at 631.

Summary judgment will lie against a civil rights plaintiff when the plaintiff's stated facts do not raise a civil rights violation or where there is a clear immunity thereof. *Morrison v. Walker*, 404 F.2d 1046 (9th Cir. 1969).

DISCUSSION

I. *Section 1983 Claims*

To establish a claim under 42 U.S.C. § 1983, a plaintiff must allege "the violation of a right secured by the Constitution and the laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988). As there is no dispute that defendants were acting under color of state law, the focus of this case is whether defendants' conduct deprived plaintiffs of their constitutionally protected rights.

Section 1983 does not impose liability for violations of duties of care arising out of state tort law. *DeShaney v. Winnebago Cty. Soc. Servs. Dept.*, 489 U.S. 189 (1989). Also, not every injury for which a state official is responsible is actionable under section 1983. *Martinez v. California*, 444 U.S. 277 (1980).

A. *Substantive Due Process*

1. *Liberty Interests*

Plaintiffs allege that they were deprived of their liberty interests by the officer's shooting of the dog and pointing of the gun at Lenny. The substantive component of the due process clause of the Fourteenth Amendment protects individual liberty "by barring certain government actions regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

a. *Liberty Interest in the Dog*

Plaintiffs allege they were deprived of their liberty interests as a result of their dog being shot by Officer Vines. Plaintiffs, however, cite no authority supporting their position that a dog owner is deprived of liberty interests by an officer's shooting of the owner's dog. The only relevant case cited by either party is a Seventh Circuit case, where the court held that the shooting of a dog does not implicate liberty interests of the dog owner. *Pfeil v. Rogers*, 757 F.2d 850, 866 (7th Cir. 1985), *cert. denied*, 475 U.S. 1107 (1985).

In *Pfeil v. Rogers*, officers shot and killed three dogs owned by the plaintiff under circumstances more egregious than those alleged here. *Id.* The officers shot four bullets into one animal as it attempted to flee the doghouse, leaving the other fatally wounded dog to die in the woods. *Id.* at 866. The court held "[a]lthough we find the officers' conduct

offensive, it does not . . . violate a right guaranteed under the United States Constitution." *Id.* The court added:

> [o]ur disapproval is not to be misunderstood in any manner to infer that a law enforcement officer must subject himself to being attacked by an animal, including a dog, before he is allowed to protect himself and use his gun if he reasonably believes in the exercise of rational judgment that he is threatened with serious bodily harm.

Id.

The court finds the Seventh Circuit's reasoning persuasive. Because plaintiffs provide no authority to support their position that a dog owner is deprived of liberty interests by an officer's shooting of his dog, plaintiff's substantive due process claim is barred as a matter of law.

b. *Liberty Interests of Lenny*

Plaintiffs also allege that they were deprived of their liberty interests when the officers pointed his gun at Lenny. Defendants, however, contend that the officers' mere pointing of the gun at Lenny did not rise to the level of a constitutional violation. *Hinojosa v. City of Terrell, Tex.*, 834 F.2d 1223, 1230 (5th Cir. 1988), *cert. denied*, 493 U.S. 822 (1988).

In *Hinojosa*, an officer was arresting a person when plaintiff allegedly shouted at the officer that he was using unnecessary force. *Id.* at 1225. The officer pointed a gun directly at the plaintiff and ordered him to back away. *Id.* at 1225-26. Plaintiff brought a section 1983 action as a result of the officers' pointing of the gun at him. *Id.* at 1226. Plaintiff stated that having a gun pointed at him made him scared, and that the incident had made him unable to work for a few weeks. *Id.*

The *Hinojosa* court held that the plaintiff's injury could only be characterized as temporary emotional distress, and did not rise to the level that can be redressed under a section 1983 claim. *Id.* at 1229-30. The court stated that "[t]here is absolutely no evidence, and neither Hinojosa nor any of the police officers testified, that Hinojosa was struck, or even touched, during the incident." *Id.* at 1230. The court also noted that Hinojosa did not claims to have suffered even minor physical injuries or intrusion. *Id.* at 1229.

The court added that a police officer's display of force, used as a conditional threat to use actual force, if necessary, may actually have the effect of decreasing violence. *Id.* at 1231. The court stated that "[b]y giving a police officer the ability to pull out and point a service revolver at someone without risking tort liability, he may be able to abort a potentially violent situation." *Id.*; see also *Gumz v. Morrissette*, 772 F.2d 1395, 1401 (7th Cir. 1985), *cert. denied*, 475 U.S. 1123 (1986) ("While this type of unnecessary display of force can hardly be condoned, the restraint shown by these officials in utilizing the force amassed and the absence of any physical or bodily injury place this case with those claims actionable only under state tort law.")

In the present case, plaintiffs admit that Lenny was outraged by the officers' cold-blooded cruelty and that he was wrestled to the ground by his friend out of fear of further confrontation with the police officers. *See* Plaintiffs' Mem. Opp. Summ. J. at 4. Thus, by plaintiffs' own admission, Lenny acted in a somewhat confrontational manner with the officers. Therefore, the officers' pointing the gun at Lenny was objectively reasonable under the circumstances of the case. *Graham v. Connor*, 490 U.S. 386, 296-97 (1989) (the inquiry in an excessive force case is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them; reasonableness of a particular use of force must be judged from the perspec-

tive of a reasonable officer on the scene, and its calculus must embody an allowance for the fact that police officers are often forced to make split-second decisions about the amount of force necessary in a particular situation.)

Furthermore, plaintiffs have not alleged any injury other than the temporary distress as a result of having a gun pointed at Lenny. The lack of anything more than temporary distress weighs against a finding that the amount of force used was excessive for a section 1983 violation. *See Luna v. Reed*, 1992 U.S. Dist. Lexis 2623 (N.D. Cal. Feb. 27, 1992).

Because no actual use of physical force was inflicted upon any of the plaintiffs and because the plaintiffs did not allege injury rising to the level of a constitutional violation, the officers and the City are entitled to judgment as a matter of law.

2. *Property Interests*

Plaintiffs also allege that defendants violated plaintiffs' substantive due process rights as a result of the deprivation of their property interests in the dog. Plaintiffs' only support for this position is a statement from *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972), to the effect that property rights are basic civil rights. The issue in *Lynch* was whether the district court had jurisdiction under 28 U.S.C. § 1343 to hear a claim involving deprivation of property rights. Id. at 540. The court did not establish that a person's substantive due process rights are violated by the deprivation of his property interests in his dog. Plaintiffs cite no other authority nor does any exist for this proposition. Accordingly, no genuine issue of material fact exists and summary judgment is proper.

B. *Procedural Due Process*

Plaintiffs also allege that they were deprived of procedural due process as a result of the shooting of their dog and pointing of the gun at Lenny. The factors the court considers in a procedural due process analysis include: first, the private interests that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and third, the governments' interests, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Zinermon v. Burch*, 494 U.S. 113, 127 (1990), (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

Defendants do not contest that plaintiffs have a property interest in their dog and a liberty interest in their persons. Defendants, however, argue that a post-deprivation hearing meets due process requirements under the circumstances of this case. *Parratt v. Taylor*, 451 U.S. 527 (1981). The court in *Parratt* held that a deprivation of property followed by a post-deprivation hearing may, under certain circumstances, not violate the due process clause of the Fourteenth Amendment. *Id.* at 538-43. Plaintiffs argue, however, that *Parratt* has been interpreted narrowly to apply only to minor infractions of prisoner interests in their personal property. *Bretz v. Kelman*, 773 F.2d 1026 (9th Cir. 1985). In *Bretz*, the court stated that *Parratt* does not apply to official assaults, batteries or other invasions of personal liberties. *Id.* at 1030. Plaintiffs claim that the present case is distinguishable from Parratt because of the alleged assault in addition to the deprivation of property interests in the dog.

1. *Procedural Due Process in Property Interest*

Plaintiffs argue that *Parratt* does not apply to the present case because the value of the plaintiffs' property interests in

the dog exceeds the $23.50 value of the hobby kit in *Parratt*. Defendants argue that this court should follow *Engsberg v. Town of Milford*, 601 F. Supp. 1438 (W.D. Wis. 1985). In *Engsberg*, the plaintiff asserted a procedural due process claim arising from the town constable's shooting of his five dogs. *Id.* at 1445. The court granted summary judgment in favor of the defendants, holding that all three requirements for the application of *Parratt* were met. *Id.* The *Engsberg* court stated that *Parratt* stands for the proposition that a deprivation of property is not "without due process" if (1) a pre-deprivation hearing is impracticable (2) the deprivation is random and unauthorized, and (3) state post-deprivation remedies for the property loss are adequate. *Id.*

The court in *Engsberg* held that a pre-deprivation hearing was impossible because the town Board as a whole learned of the officer's conduct only after he had shot the dogs. *Id.* Also, the officer's conduct was random and unauthorized in that the town had no policy in favor of shooting dogs without complying with state law and the town board had not authorized the conduct. *Id.* Finally, the court stated that the state law provided adequate tort remedies for intentional and unintentional conduct by officers and therefore, the state's post-deprivation remedies as a whole were adequate. *Id.* at 1446.

The present case is very similar to *Engsberg*. As in *Engsberg*, a pre-deprivation hearing was impracticable under the circumstances of this case because the officers needed to make a determination at the time of the impending threat as to the degree of force required for self-defense. Also, plaintiffs have not presented any evidence to raise a genuine issue that the police department's policy was to favor unnecessary shooting of dogs. Finally, as in *Engsberg*, plaintiffs have available to them post-deprivation tort remedies under California law. Accordingly, the court finds as a

matter of law that plaintiffs were not deprived of property interests without due process of law.

2. *Procedural Due Process in Liberty Interests*

Plaintiffs also allege that *Parratt*'s post-deprivation hearing is inapplicable to assaults or batteries by officers. *Bretz*, 773 F.2d at 1030 (*Parratt* did not deal with official assaults, batteries or other invasions of personal liability). Plaintiffs, however, do not present any evidence or authority to support their position that an assault occurred in the present case or that a pre-deprivation hearing was required prior to the officers' pointing the gun at Lenny. Furthermore, as with the property interests in the dog, a pre-deprivation hearing was impossible under the circumstances of this case because the officers needed to determine at the time of the impending threat buy Lenny the degree of force required to maintain public order and prevent violence. Also, state tort remedies including assault and negligent infliction of emotional distress are available to plaintiffs. Accordingly, there is no genuine issue of material fact and summary judgment is proper on the deprivation of liberty interests without procedural due process claim.

C. *Claim against City of Richmond*

Plaintiffs also allege that the City of Richmond is liable for its failure to adequately train and supervise its officers. Because we find that there was no constitutional deprivation in the present case, it is irrelevant whether the City failed to adequately train and supervise. *Los Angeles v. Heller*, 475 U.S. 796, 799 (1986). In *Heller*, the court noted:

> If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the

> use of constitutionally excessive force is quite beside the point.

Id. (emphasis in original).

Furthermore, municipalities cannot be held liable on a respondeat superior theory under section 1983. *City of Canton v. Harris*, 489 U.S. 378, 385 (1988). The Court in *St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988) listed the circumstances under which municipalities may be held liable. First, the municipality may be held liable only for acts which it officially sanctioned or ordered. *Id.* Second, only those municipal officers who have "final policymaking authority" may by their actions subject the government to liability. *Id.* Third, whether a particular official has "final policymaking authority" is a question of state law. *Id.* Fourth, the challenged action must have been taken pursuant to a policy adopted by the officials responsible under state law for making policy in that area of the city's business. *Id.*

Plaintiffs have not alleged that Chief Clement or the officers possessed "final policymaking authority" for the City of Richmond. Also, the decisions of police officers made in the field are per se not the type of final policymaking decisions that will subject a municipality to liability. *See Oklahoma City v. Tuttle*, 471 U.S. 808, 821 (1985) (an unjustified shooting by a police officer cannot, without more, be thought to result from official policy.) Accordingly, the City of Richmond is not liable under section 1983 and is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

II. *State Law Claims*

Because this court grants defendants' motion for summary judgment, the court will exercise its discretion and DISMISS the state law claims of negligent infliction of emotional distress, assault, and deprivation of property. The

court has concluded that the proper place for the adjudication of these claims is in state court.

III. *Request for Continuance and Amendment*

Plaintiffs also request continuance under Federal Rule of Civil Procedure 56(f) and leave to file an amended complaint under Federal Rule of Civil Procedure 15(a). Plaintiffs claim they should be granted a continuance because they have had no opportunity whatsoever to obtain formal discovery from defendants and thus a grant of summary judgment would be unfair.

Under Rule 56(f), a party must indicate the discovery requests that are pending and how they would bar summary judgment. A general declaration that plaintiffs have not conducted discovery is insufficient for Rule 56(f) requirements. Accordingly, plaintiffs' motion for continuance under Federal Rule of Civil Procedure 56(f) is DENIED.

This court also DENIES plaintiffs' motion to amend the complaint. The court finds that plaintiffs' section 1983 claims lack basis in law and plaintiffs' proposed amendment would not cure the deficiencies. Accordingly, plaintiffs' motion to amend the complaint is DENIED.

CONCLUSION

Accordingly, the court GRANTS defendants' motion for summary judgment. The court also DISMISSES plaintiffs' state law claims. Finally, the court DENIES plaintiffs' motion for continuance and leave to amend.

IT IS SO ORDERED:

/s/
MARILYN HALL PATEL
United States District Judge

Dated: November 3, 1992